

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Gary Hofmann,

Plaintiff,

v.

Fifth Generation, Inc.,

Defendant.

Case No.: 14-cv-02569-JM-JLB

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO COMPEL SITE
INSPECTION**

[ECF No. 53]

Before the Court is Plaintiff Gary Hofmann's Motion to Compel Site Inspection. (ECF No. 53.) Plaintiff's motion is GRANTED IN PART AND DENIED IN PART as follows.

Legal Standard

Under Rule 26, subject to the limitations imposed by subsection (b)(2)(C), "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. . . ." Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* However, "[o]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of

1 the case, the amount in controversy, the parties’ resources, the importance of the issues at
2 stake in the action, and the importance of the discovery in resolving the issues.” Fed. R.
3 Civ. P. 26(b)(2)(C).

4 Rule 34 permits a party to “serve on any other party a request within the scope of
5 Rule 26(b) . . . to permit entry onto designated land or other property possessed or
6 controlled by the responding party, so that the requesting party may inspect, measure,
7 survey, photograph, test, or sample the property or any designated object or operation on
8 it.” Fed. R. Civ. P. 34(a)(2).

9 Analysis

10 Here, Plaintiff served a Fed. R. Civ. P. 34(a)(2) request on Defendant, seeking to
11 inspect and videotape Defendant’s distillery and manufacturing facility as well as the
12 “equipment used” therein to manufacture Tito’s brand “Handmade” vodka. (ECF No.
13 53-1 at 2; ECF No. 53-2 at 6-7.) Defendant objects to the requested site inspection as
14 irrelevant, premature, harassing, vague, overbroad, and unduly burdensome. Defendant
15 further objects that the inspection is an undue invasion into its confidential, proprietary,
16 and trade secret information, raises significant safety and liability risks, and unduly
17 interferes with Defendant’s business operations. (ECF No. 53-2 at 12-31.) Defendant
18 complains that Plaintiff refuses to provide details about what the inspection and
19 videotaping would entail, in spite of numerous requests for that information. (ECF No.
20 54 at 5.)

21 Plaintiff argues that the inspection is relevant and that Defendant’s objections
22 should be overruled. “Plaintiff seeks a site inspection of Defendant’s distillery and
23 manufacturing facility to inspect how the product is made to assess the veracity of the
24 ‘handmade’ claims Defendant makes on its label.” (ECF No. 53-1 at 4.) However,
25 Plaintiff’s primary argument is that the site inspection is relevant to show the numerosity
26 element for purposes of his anticipated motion for class certification under Federal Rule
27 of Civil Procedure 23. (ECF No. 53-1 at 5-7.) As to Defendant’s objection about a lack
28 of particulars about the proposed inspection, Plaintiff asserts that he will share the

1 “‘who’, ‘what’, ‘when’, ‘how’ details of the inspection” after the parties have agreed on a
2 date. (ECF No. 53-1 at 8.)

3 As to the argument that Plaintiff needs a videotaped inspection of Defendant’s
4 plant to establish numerosity, the Court is not persuaded. Under Rule 23, numerosity is
5 established if “the class is so numerous that joinder of all members is impracticable.”
6 Fed. R. Civ. P. 23(a)(1). Although the “requirement is not tied to any fixed numerical
7 threshold . . . courts find the numerosity requirement satisfied when a class includes at
8 least 40 members.” *Rannis v. Recchia*, 380 Fed. App’x 646, 651 (9th Cir. 2010); *Waller*
9 *v. Hewlett-Packard Co.*, 295 F.R.D. 472, 482 (S.D. Cal. 2013).

10 Here, Plaintiff seeks to represent a class of consumers who, at the time of purchase,
11 saw and relied on to their detriment the allegedly false and misleading “handmade”
12 representation on the label for Tito’s vodka. (See ECF 16 at ¶¶16-20, 42, 49.) Plaintiff
13 pleads the following definition of the putative subclass: “all of Defendants’ customers
14 who reside in California and/or California individuals who purchased offending Class
15 Products from September 15, 2010 to the present.”¹ (ECF No. 16 at ¶34.) Thus, whether
16 the numerosity element is satisfied in this action will turn on whether Plaintiff can show
17 that, from September 15, 2010 to the present, at least 40 consumers from the defined
18 geographical area bought a bottle of Tito’s vodka with the “handmade” representation on
19 the label.²

20 Plaintiff fails to meet his burden to show that the requested site inspection or
21 survey proposed is relevant to numerosity.³ Without citation to legal authority, Plaintiff
22 argues that “[i]t is likely that to establish the numerosity element for class certification,
23

24
25 ¹ Plaintiff does not plead any other class definitions in the operative complaint.

26 ² Defendant contends that this element will easily be shown for purposes of class certification because,
in part, it “will not be contesting numerosity.” (ECF No. 54 at 4.)

27 ³ On reply, Plaintiff argues that “[e]stablishing an understanding of how consumers perceive or define
28 ‘handmade’ is central to both Plaintiff’s and Defendant’s positions on class certification.” (ECF No. 55
at 3.) However, Plaintiff merely refers back to his moving papers and fails to tie his argument to any
Rule 23 element beyond numerosity.

1 Plaintiff will need to establish that the putative class had a similar understanding of or
2 definition for what ‘handmade’ means.” (ECF No. 53-1 at 5.) Plaintiff then goes on to
3 explain that performing a consumer perception survey that utilizes a video recording of
4 his site inspection of Defendant’s “process” for making Tito’s vodka is “the best way to
5 define the term ‘handmade’” and show a consensus among average consumers that the
6 “handmade” label is deceptive and misleading. (ECF No. 53-1 at 5-6; ECF No. 55 at 3.)
7 Plaintiff fails to show how his proposed survey of the average consumer (who may not
8 even be a member of the putative class) is relevant to demonstrating numerosity – *i.e.* at
9 least 40 consumers bought a bottle of Tito’s vodka with the “handmade” representation
10 on the label during the relevant time frame and from the defined geographical area.⁴

11 Although the Court is unpersuaded that a videotaped site inspection is relevant to
12 issues of class certification, a site inspection of Defendant’s distillery and manufacturing
13 facility may well be relevant to the merits of the claims and defenses in this case. An
14 inspection is relevant insofar as “Plaintiff seeks a site inspection of Defendant’s distillery
15 and manufacturing facility to inspect how the product is made to assess the veracity of
16 the ‘handmade’ claims Defendant makes on its label.” (ECF No. 53-1 at 4.) Defendant
17 objects to an inspection, but mostly based on the alleged undue burdens that arise from
18 the pre-certification timing and the requested videotaping of the site inspection. Thus,
19 the issue is whether the discovery should be limited or barred based on Defendant’s
20 objections.

21 The Court is convinced that Plaintiff’s request to videotape his site inspection
22 should be barred, at least at this point in the proceedings, as the burden of the requested
23 discovery significantly outweighs its likely benefit. Further, Plaintiff is able to obtain the
24 information about Defendant’s process for making Tito brand vodka through other more
25 convenient, less burdensome, and less expensive methods of discovery, such as requests
26

27 ⁴ The parties seem to be in agreement that, at class certification, Plaintiff has the burden to define the
28 term “handmade.” (ECF No. 53-1 at 5-6; ECF No. 54 at 5; ECF No. 55 at 3.) However, the Court is not
persuaded that the discovery sought is relevant to this burden.

1 for production, interrogatories, requests for admissions, or deposition. Notably, the
2 intended purpose for the videotape is for Plaintiff to conduct a consumer survey that
3 shows portions of the videotape to a sampling of consumers. Yet, doing so would violate
4 paragraphs 7.2 and 7.3 of the parties' Stipulated Protective Order. (ECF No. 42 at 9-11.)
5 And even if the Stipulated Protective Order is modified to allow for the proposed
6 consumer survey, Plaintiff fails to persuade the Court that a videotape of his site
7 inspection is "the best way" (or even one of the better ways) to obtain the consumer
8 survey results he seeks. (*See* ECF No. 53-1 at 5-6; ECF No. 55 at 3.) It would seem that
9 Plaintiff can endeavor to obtain the survey results he seeks through other means, such as
10 by crafting written survey questions and/or utilizing other available visual aids. For
11 example, it appears that there is a publicly available virtual tour of Defendant's facilities.
12 (ECF No. 54 at 7.)

13 A videotaped site inspection poses a significant burden to Defendant in terms of
14 business disruption, safety, and proprietary and trade secret interests. Defendant's
15 relevant facility is a secure, non-public facility that contains valuable private information.
16 The Court is persuaded that a videotaped site inspection would unnecessarily disrupt
17 Defendant's business operations by requiring supervision and assistance by Defendant's
18 employees during and after the inspection to ensure safety and protection of proprietary
19 information. A videotaped site inspection also raises significant safety risks as the
20 relevant facility "is an industrial setting where highly volatile and flammable
21 chemicals—namely, 190 proof alcohol—are in use." (ECF No. 54 at 7.) Plaintiff fails to
22 articulate a reasonable method for conducting his requested videotaped site inspection in
23 light of these significant burdens raised by Defendant.⁵ Ultimately, the Court is
24 persuaded that the burden of the discovery request (to videotape Plaintiff's site
25 inspection) on Defendant and its operations is too great relative to its benefit.

26
27 ⁵ For the reasons set forth by Defendant, Plaintiff's proposal to obtain insurance fails to sufficiently
28 address the significant safety risks and undue burden posed by the inspection Plaintiff seeks. (ECF No.
54 at 7-8.)

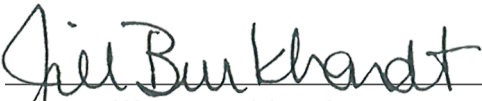
1 Nevertheless, the Court is persuaded that an in-person site inspection sufficient to
2 show Defendant's process for making Tito brand vodka, conducted at a reasonable time
3 and under reasonable conditions, is relevant and does not pose an undue burden on
4 Defendant. Such a site inspection is relevant to the merits of the case. Plaintiff may
5 discover information about, for example, how Tito vodka is made and whether
6 Defendant's "handmade" claims constitute materially misleading representations. (*See*
7 ECF No. 53-1 at 5.) In light of the evidence of site visits from the TTB and a *Forbes*
8 magazine reporter and the Court's confidence that the parties can negotiate a reasonable
9 site inspection, the Court overrules Defendant's objections and orders Defendant to
10 permit an in-person, non-videotaped inspection of its distillery and manufacturing facility
11 sufficient to show Defendant's process for making Tito brand vodka. (*See* ECF No. 53-1
12 at 7-8; ECF No. 55 at 4-5.)

13 Conclusion

14 For the reasons stated above, Plaintiff Gary Hofmann's Motion to Compel Site
15 Inspection (ECF No. 53) is GRANTED IN PART AND DENIED IN PART. On or
16 before **February 26, 2016**, Defendant shall permit Plaintiff to conduct an in-person, non-
17 videotaped site inspection of Defendant's distillery and manufacturing facility sufficient
18 to show Defendant's process for making Tito brand vodka.

19 IT IS SO ORDERED.

20 Dated: November 25, 2015

21 
22 Hon. Jill L. Burkhardt
23 United States Magistrate Judge
24
25
26
27
28